UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLUMBIA MEMORIAL HOSPITAL

and

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Cases: 03-CA-120636
03-CA-122557
03-CA-124333
03-CA-124803
03-CA-124816

RESPONDENT, COLUMBIA MEMORIAL HOSPITAL'S REPLY IN OPPOSITION TO GENERAL COUNSEL'S EXCEPTION AND IN FURTHER SUPPORT OF THE RESPONDENT'S EXCEPTIONS

LOMBARDI, WALSH, DAVENPORT
AND AMODEO, P.C.
Paul E. Davenport, Esq.
Attorneys for Columbia Memorial Hospital
187 Wolf Road, Suite 211
Albany, New York 12205
Tel. No.: (518) 438-2000

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PRELIMINARY STATEMENT

It is submitted that the Administrative Law Judge did not err in omitting language in its recommended order that the General Counsel seeks in the exceptions, as the language proposed is overbroad and not the typical language provided for in such orders. Moreover, the cases that the General Counsel cites in support are not authority for the incorporation of such broad and expansive language.

Moreover, it is submitted neither the General Counsel nor the charging party's brief in opposition to the exceptions of the Respondent, Columbia Memorial Hospital, will save the deficiencies in the ALJ's reasoning that the Hospital exhibited discriminatory intent in disciplining Cindy Northrup or that they would not have disciplined her absent the alleged protected activity. Their argument, like the ALJ's, not only improperly minimizes the impact that her actions have on the operations of the Hospital, but also seek to analyze the Hospital's actions in a vacuum without regard to the facts and circumstances that were occurring at the time, including the Hospital's sincere belief in maintaining the security and safety of its patients and staff and the importance that honesty in an internal investigation has on the entire operation of the Hospital and the health care system. These attempts to minimize Hospital valid concerns do not support the ALJ's piecemeal analysis and reasoning, and the ALJ's determination on the discipline of Ms. Northrup be reversed.

POINT I

A. CINDY NORTHRUP'S DISHONESTY WARRANTED DISCIPLINE

It is respectfully submitted, as set forth in the Hospital's original Brief for Exceptions, the credible proof, and it is submitted based upon the testimony of Union representative, Tim Rodgers, the uncontroverted proof, is that Cindy Northrup was dishonest during the course of the investigation of the incident of December 26, 2013 – most egregiously on a January 28, 2014 hearing when, despite admittedly knowing that she had let another Union Representative in through a limited access door, she persisted in her dishonest answers that she did not recall if she let that person in. These facts, testified to not only by Hospital representatives, Kelly Sweeney and Shanda Steenburg, but also by Union representative, Timothy Rodgers, who admitted that Ms. Northrup was asked at the January 28th hearing whether or not she let Rosa Lomuscio in the limited access door, established her dishonesty. Thus, this credible proof, is that Ms. Northrup was knowingly dishonest on January 28, 2014 when she persisted, despite admitting that she knew the truth, that she did not recall if she let Ms. Lomuscio in.

Moreover, her discipline was less than similarly situated employees had received for being dishonest in an internal investigation. As the Hospital's proof sets forth, there were at least two other prior instances, where employees were disciplined for not being truthful in an internal investigation (see, Respondent Exhibits "10" and "11"). In each of those cases the employee was terminated; yet here Ms. Nortrhup based upon her lack of prior disciplines and long tenure at the Hospital was given only five days suspension. In opposition to this proof, the General Counsel and charging party seek to uphold the ALJ's

determination that Ms. Northrup's dishonesty was "understandable and reasonable" during the course of the employer's investigation, by claiming that:

> (i) because patient care wasn't at issue, Ms. Norhtrup's dishonesty is mitigated;
>
> (ii) the prior instances of discipline (see, Respondent Exhibits "10" and "11") were not similar, as they were not for failure to recall or refuse to identify.

However, this attempt to justify her behavior in a vacuum without regard to the circumstances and consequences of that action reveals that the Hospital was justified and acted without discriminatory and/or would have taken that same action regardless of Ms. Northrup's status in the Union

The main thrust of the General Counsel in the Charging Party's argument seems to be that because patient care was not at issue in this investigation, this diminishes the impact Ms. Northrup's knowing dishonesty had on the Hospital. However, an employee's duty to be honest in a health care setting is not limited to simply patient care issues but rather to all aspects of their employment relationship. As noted in the prior brief, this is the basic obligation an employee has to its employer. (See, *Six West Limited Corp. v. NLRB*, 237 F. 3d 767 (Seventh Circuit 2001]). It is submitted that the basic obligation of honesty is not limited to simply patient care issues, but any time the employer investigates an occurrence at the Hospital that may impact not only patient care but the safety and well being of its patients, staff and visitors. Here, it is submitted, Ms. Northrup failed to meet those basic obligations, as Ms. Northrup violated the safety concerns of the Hospital and was not honest about her actions that, potentially could lead to serious safety issues. The Administrative Law Judge's finding that her honesty was "understandable and reasonable"

about the very serious safety concerns the Hospital was investigating opens the door for employees to avoid this basic responsibility to the Hospital, and may prevent the Hospital from rooting out wrongdoing or improper conduct that may impact the safety and well being of its patients and staff. In essence, the ALJ's decision has sanctioned an employee from committing improper conduct, and then being evasive about it without fear of sanction or correction.

It is submitted, that the Hospital had a legitimate safety concern about who was in the Hospital and where they were located and Ms. Northrup, knowingly was dishonest about this investigation at least on three (3) occasions, the most egregious being on January 28, 2014 when she admitted that she knew the truth but failed to disclose it. Moreover, that it may not have directly impacted patient care is irrelevant. Additionally, that it may be reasonable for an employee not to self-incriminate does not support a finding that she did not engage in conduct warranting discipline.

Therefore, the ALJ's determination that her discipline for dishonesty occurred under circumstances giving rise to discriminatory intent was error, as was his finding that the Hospital would not have disciplined her for this act absent her Union affiliation.

B. NORTHRUP'S LESSER DISCIPLINE THAN SIMILAR SITUATED EMPLOYEES NEGATES ANY ANTI-UNION INTENT

In a strained interpretation of the phrase "similarly situated", both the ALJ, the Charging Party and the General Counsel seek to minimize the prior instances of discipline for dishonesty claiming that none were involved not recalling or failing to identify another person. It is respectfully submitted that this is an improper and unworkable standard,

particularly in a case involving the serious allegation of dishonesty. At the course of hearing the employer put forth four (4) separate instances of employees being disciplined for dishonesty, including two (2) who were terminated, one Union, one non-Union individual, for being dishonest during the course of an internal investigation. (See, Respondent Exhibits "10" and "11").

Notably, Ms. Northrup was also disciplined for being dishonest during the course of an internal investigation, similar to the employees in Respondent's Exhibits "10" and "11". Thus, it is submitted these are similarly situated employees in that they were too not honest during the course of their employment investigation and were terminated for it. It is submitted that although neither one involves someone not recalling something or failing to identify someone, that is not the relevant inquiry. Each disciplinary situation has differing facts and circumstances that give rise to discipline. To accept the standard found by the ALJ in defining what a similarly situated employee is, is unworkable, as rarely is discipline based on the exact same set of circumstance.

The fact is that Ms. Northrup was dishonest three (3) times during the course of an internal investigation and was rightfully disciplined for it. This, plus the fact that Ms. Northrup was given a lesser discipline, it is submitted negates any discriminatory intent on behalf of the Hospital. (See, *Dish Network*, 359 NLRB No. 108 [2013]).

POINT II

THE ALJ'S RECOMMENDED ORDER IS PROPERLY WORDED

The General Counsel seeks an exception to add language to the ALJ's recommended order; language that appears too broad and will just invite further litigation, as its terms are unambiguous and subject to interpretation.

It is submitted that the language provided by the General Counsel is not the standard language in an information request case. The language provided appears to give the General Counsel carte blanche to claim a violation of the order in any future situations it feels the Hospital has not complied with information requests.

Moreover, this unprecedented request is unsupported by the case law cited by the General Counsel. Neither of the cases relied upon by the General Counsel sanctions the inclusion of such broad language. The language utilized by the Administrative Law Judge is consistent with the facts of this case, and should not be modified.

Respectfully Submitted:

PAUL E. DAVENPORT, ESQ.
Counsel for the Respondent
Columbia Memorial Hospital
187 Wolf Road, Suite 211
Albany, New York 12205
Tel. No.: (518) 438-2000